No. 13312

In the

United States Court of Appeals

for the Ninth Circuit

STATE OF WASHINGTON, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

APPELLANT'S REPLY BRIEF

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STATEMENT

The statement of the case as contained in Pages 1-15, appellant's brief, supplemented by pages 2-7, brief of appellee, will fairly inform this court of the background for this appeal.

QUESTION

Both parties concede the question to be: Whether or not there was substantial evidence to support the verdict of the jury or whether or not the trial judge was correct in setting aside the verdict.

ARGUMENT

I

The Necessity For Replacement of Highway 11-A Was A Question of Fact Which The Jury Properly Resolved in Favor of The State

In advance of our discussing the question of replacement, necessity for replacement and the evidence thereon concerning highway 11 A, we desire to point out that, despite exhaustive search on our part, there is no case which we have found in the reports, or which has been called to our attention, involving the condemnation of highways, which is on all fours with the facts in this case, or which in slang of the profession can be considered "white cow".

Counsel for appellee contends that certain of the highway condemnation cases upon which they rely are decisive in their favor on the questions here. We contend that they are as much, if not more, in favor of appellant.

The question of necessity for a certain highway and the replacement of it is one of fact that must be determined in each case by the peculiar facts in that case. The disagreement between appellant and the appellee is not on the law but in applying that law to the facts in this case.

In answer to some of the assertions made in the brief of appellee, we point out the facts in a number of the principal cases relied upon by its counsel.

State of California v. United States, 169 F. (2d) 914-924 (C.A. 9, 1948) is cited as authority for the proposition that the state is entitled to compensation on the taking of a highway only when it is compelled to construct a substitute highway. The facts in that case show that the dedicated street involved was under 20 to 24 feet of water and no substitute way could possibly be constructed.

In *United States v. Los Angeles County, Cal.* 163 F. (2d) 124, 125 (C.A. 9, 1947) cited by appellee, this court stated:

> "The evidence shows that a substitute road was necessary. The county had authority to provide such a road. Whether it could have been compelled to do so is immaterial."

The facts in that case are not detailed, but it appears that a through road was severed by the taking. Similarly a through road, highway 11 A, was severed by the taking in this case.

United States v. Des Moines County, 148 F. (2d) 448, 449 (C.A. 8, 1945) certiorari denied 326 U.S. 743 (1945) is quoted by appellant (App. Br. 20, 21). The case was reversed because damages were awarded on a wrong theory. In the opinion the court there says:

> "We have no doubt of the existence of the duty of the appellee to provide for a necessary readjustment of their road system. Whether the duty is express or implied or one which arises from necessity, we regard as of no legal consequence."

In *Jefferson County v. Tennessee Valley Authority,* 146 F. (2d) 564, 566 (C.A. 6, 1945) certiorari denied 324 U.S. 871 (1945) the road was replaced by the condemning agency and therefore there was no damage.

In *Mayor and City Council of Baltimore v. United States,* 147 F. (2d) 786, 787 (C.A. 4, 1945) the taking was of alleys which were closed and there was no obligation on the city to reopen them.

In *Woodville v. United States,* 152 F. (2d) 735, 737 (C.A. 10, 1946) certiorari denied 328 U.S. 842 (1946) no recovery was allowed because all of the town was taken for flooding. There was no obligation and indeed no opportunity to construct substitute highways.

In *United States v. State of Arkansas,* 164 F. (2d) 943 (C.A. 8, 1947) a substantial sum was paid into court and the condemning agency was providing a substitute for the highway taken. The only matter in issue was the cost of establishing and operating a temporary ferry.

In *City and County of Honolulu v. United States,* 188 F. (2d) 459, 461 (C.A. 9, 1951) certiorari denied 342 U.S. 849 (1951) it was conceded that it was not necessary to provide any substitute highway.

We respectfully urge that there was and is a necessity for the establishment of a substitute highway for that portion of highway 11 A taken in this case. Counsel argues that there are other highways that are hard surfaced and that makes it unnecessary to provide a sub-

stitute for highway 11 A. We feel that the appellee is confusing two distinct issues, one the necessity of replacement, and the other, the quality of the road taken. The latter has to do with the evidence on compensation.

In 1937 when secondary state highways, including highway 11 A, were established in the state there were then, and were at time of trial, a goodly number of such highways which were graveled roads substantially in the condition of highway 11 A at the time of the taking. Some of these highways carried less than 40 to 50 cars daily, nevertheless they were constantly operated and maintained by the state (R 556-557). The physical condition and the number of vehicles using the highway taken are not determinative of the necessity of replacement. *United States v. Wheeler Township*, 66 F. (2d) 997, 983, 984 (C.A. 8, 1933).

Highway 11 A served a definite cross state purpose as distinguished from a local purpose. (App. Op. Br. 26, 27, 34-37). Any argument on this phase is a dispute upon the evidence which the jury resolved in favor of the state.

It might here also be observed that the trial judge precluded further testimony by appellant on the question of necessity for replacement of highway 11 A. (R. 325, 326, 371, 372).

Counsel for appellee argues that the taking of highway 11 A, because of the light traffic thereon, did not

cast any additional burden on other existing highways (Br. 18-20). Said counsel calls attention to the fact that the capacity of a two-lane highway is 4,000 cars daily (R. 287) and that at the time of the taking the daily average of vehicles on the Pasco-Kennewick Bridge was 4,300 cars. We stated further on page 27 of our opening brief that the traffic count at Selah Junction then was 4,000 cars per day (R. 323). The record also shows that there was then a daily average of 5,300 vehicles at the south city limits of Yakima (R. 322).

Thus it clearly appears that the two highways or routes which counsel says were available to travelers through Yakima, from or to southwest and northeast and east central Washington, were crowded and saturated and the taking of highway 11 A closed the alternate.

Can it be said that the state is or was not entitled to keep the alternate, that the state has lost nothing by the taking? Under the evidence in this case the state seeks only the cost of building another alternate to the standard of the highway taken.

Established and owned highways and routes therefore are valuable assets of the state. They are constantly developed as need requires.

The jury, as well as other people, knew that in 1943, the time of the taking, the population of the state of Washington was rapidly increasing, not because of the

Hanford project, but because of the war and the migration of easterners to the west.

In 1940 the population of this state was 1,093,419. In 1950 the population was 1,736,191, a gain of 37% (United States Census of Population: 1950—U.S. Department of Commerce, Bureau of Census Population Report P-A47 Reprint Volume 1 Chap. 47). This court may take judicial notice of this fact. 20 Am. Jur. Sec. 98, p. 112, Sec. 27, p. 55, Sec. 53 p. 77; *Greeson v. Imperial Irr. Dist.* 59 F. (2d) 529; *The Appollon,* 22 U.S. 362, 6 L. Ed. 111.

On this phase of the matter the jury, on the evidence before it, was certainly justified in concluding that because of 1943 increasing population and traffic needs, it was necessary to construct the alternate route 3 (Exhibit 3) for the highway taken.

The necessity for highway 11 A and for replacement thereof was all a matter of evidence. That evidence came before the jury in the form of testimony of users of highway 11 A, residents at or near its termini, and highway engineers and legislators who had made study of the state highway system. All such witnesses testified that construction of the substitute or replacement highway was necessary.

The quality of the roadway, whether hard surfaced or not, would, of course, determine to some extent the number of users. But for the taking, highway 11 A would

have been available and it would have been improved from time to time as required. Problem 19—Rejected exhibits 11 and 11 A, in fact, contemplated the construction of a new bridge over the Columbia River at the point where the testimony in this case for substitute route 3 (Exhibit 3) indicated the operation of a state ferry. Rej. Ident. 11, App. Op. Br. Appx. D, pages 157, 173, 174, see also map App. Op. Br. page 149. Further, that exhibit, as said before, presupposed the continued existence of highway 11 A and provided for a connection with 11 A with a highway across the aforesaid planned bridge and easterly along Wahluke slope as shown by Route 2, (Exhibit 3) in this case.

The increasing of the population in 1943, the development of the Columbia Basin area temporarily stopped by the war in 1943, the taking and closing of highway 11 A, as well as the other facts in this case, all made more evident to the jury the necessity for replacement of highway 11 A.

The evidence of use, the number of cars or vehicles local or otherwise, the traffic on other highways, the demand made for replacement regardless of whether such demand was from community chambers of commerce, all added up to a substantial showing of necessity. Suppose the number of through vehicles across highway 11 A had been shown to have been substantially greater. Would

counsel for appellee say that any certain number of users will show necessity while a lesser number will not?

Future development of the state would require in time a hard surface for 11 A, but the route, the gravel road, was the state's before the taking. We feel that the rearranging of the highway system to the extent disrupted by the government should be compensated for by it.

The record shows that the evidence on compensation was based on cost of construction of a roadway of comparable quality (R. 198, 203-208, 309, 310, 386, 402-404). The appellant is entitled to a roadway of comparable quality, even though highway 11 A was of the lowest type, and even though there was a comparatively small amount of traffic on it. *United States v. Wheeler Township,* 66 F. (2d) 977, 983, 984 (C.A. 8, 1933).

II

The Trial Judge Weighed The Evidence, Reached A Conclusion Different From That of the Jury, Then Improperly Set Their Verdict Aside

Counsel argues in his brief (Br. 12, 13) that the question is whether there is substantial evidence to sustain the verdict. We agree that is the problem. If there is substantial evidence, then the trial judge erred. The brief of appellee however seems to argue disputed questions of fact, matters for the jury's determination.

The importance of the highway was testified to by many witnesses, expert and otherwise, as were the facts upon which each might have voiced an opinion. (R. 89-96, 166-172, 294-296, 331-340, 351-355). The quantity of local and through traffic is discussed by appellee (Br. 16, 17). The facts in that respect were quite different than the appellee states them to be (R. 577, 588). This is true also for the conjestion on other roadways. (R. 322, 323).

We respectfully call attention to our opening brief (App. Op. Br. 16-19) and the argument and authorities on the question of setting aside the verdict. Counsel has, by arguing appellee's evidence and taking the most favorable view thereof, sought to imply there is no conflict. He is, in effect, justifying the trial court in substituting its judgment for that of the jury.

The evidence is not to be weighed by the trial court on the motion to set aside the verdict. *Sartor v. Arkansas National Gas Corp.*, 322 U.S. 767, 64 S. Ct. 724, 729.

Because of the substantial evidence which we have above pointed out, as in this case, on the question of necessity, we feel that the trial judge's decision resulted only from his weighing of the evidence and reaching a conclusion different from that of the jury.

III

The Trial Judge Improperly Rejected Evidence Of Existing 1943 Plans For Development Of Highways And Of The Columbia Basin Area

Counsel for appellee urges (Br. 25) that this point

was not properly set forth in the statement of points on appeal and specification of errors. As we interpret the rules of this court, we are not required to outline the argument, but rather to apprise this court and opposing counsel, in the statement of points and specification of errors, of matter to be considered by the court on appeal.

In the statement of points (R. 56) Point No. 2, we stated in substance that the trial judge erred in holding that the verdict of the jury was not supported by substantial evidence and in holding that no substantial evidence was adduced in trial establishing, or tending to establish, necessity for replacement. Adduced means offered or brought forth. We considered that all of the evidence, both offered and admitted, was clearly within the designation of that particular point.

For the assignments of error in our brief, we respectfully refer to page 15 thereof, and assignment 5. We could not have been more explicit unless we referred specifically to the exhibits by number and to the statements sought to be elicited from the witnesses. We do not interpret the rules of this court as requiring that practice. Certainly counsel for appellee was present at trial and he knows what evidence was excluded.

Counsel cites cases which hold that the admission of evidence is discretionary (Br. 25, 26). These decisions pass upon the evidence offered to establish value of

property in eminant domain cases. Here the evidence offered was to show the reasonable necessity of the highway taken. We contend that the evidence and exhibits rejected and referred to in the opening brief (App. Br. 38-40) were admissible as relevant and competent. The exhibits for Identification 11 and 11 A were prepared long before the Hanford project was conceived. They showed the permanent character of highway 11 A. It was recognized as an integral part of the state system. The exhibits show its contemplated use and presuppose its continued and uninterrupted existence. The exhibits, like the testimony of the witness Beckey (R. 104-133) and the map prepared by him (Iden. 5 and 6 Rej. R. 133-151), were admissible to show that the use of highway 11 A was taken for granted in planning for future development. The weight to be given that evidence was for the jury under proper instructions. To have the court reject the evidence and then state that there was no substantial evidence to go to the jury was error, cured by the verdict, but again reemphasized by the order setting aside the verdict.

In *Clark v. United States,* 115 F. (2d) 157, 161 (C.A. 8, 1946) the court says:

> "The discretion, however, is not an arbitrary one, but must be exercised judicially, and where, as here, there can not be said to be a market value the inquiry may properly cover a wide scope."

In *United States v.* 25.406 *Acres of Land,* 172 F. (2d)

990, 994 (C.A. 4, 1949) certiorari denied 337 U.S. 931 (1949) the court had before it the question of admissibility of plans for future development of the area taken. On this phase the court stated:

> "The development as to which testimony was allowed was one which had been carefully planned in detail before the taking by the government and one which would have been carried out but for the taking."

That opinion further quotes from *Metropolitan Water District v. Adams,* Cal. Sup. 116 P. (2d) 7, 20, 21, as follows:

> "This evidence showed that the projects, far from being purely remote, conjectural, and speculative, lay well within the realm of probable achievement and economic feasibility. They were not conceived or outlined for the mere purpose of proving a point in this litigation or creating a market for the property, but represent the fruit of years of study and effort on the part of expert engineers * *".

The state of development in 1943 in the Columbia Basin, the laws pertaining to the planning on the project and the delay due to the war, all emphasize the admissibility of the plans and disclose the necessity for and continued use of highway 11 A. The evidence was admissible, its weight was for the jury.

The report discusses "desirable additions to and modifications of the road net" of which highway 11 A was a part. The report assumes its continued use. "Existing highways" refers to highway 11 A. Counsel argues

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The state of development in 1943 in the Columbia Basin, the laws pertaining to the planning on the project and the delay due to the war, all emphasize the admissibility of the plans and disclose the necessity for and continued use of highway 11 A. The evidence was admissible, its weight was for the jury.

The report discusses "desirable additions to and modifications of the road net" of which highway 11 A was a part. The report assumes its continued use. "Existing highways" refers to highway 11 A. Counsel argues

that since the report says the "existing highways are adequate for present needs," that means that the government can close highway 11 A without upsetting the highway system. We are discussing a highway that existed and was used in 1939 when the law was passed providing for the study (Ch. 169, Laws of 1939) and in 1941 when the report was made (Idents. 11 and 11 A) and when the amending Columbia Basin Act of March 10, 1943 was passed (57 Stat. 14) to set up the projects for canals, farm units and roads, both existing and to be constructed. The testimony and offered exhibits were erroneously rejected.

The jury was entitled to consider plans of projected development as such plans existed on and before the inception of the Hanford Project. In 1943 gas rationing was in force, the result of World War II was in doubt, and all development was at a standstill.

Necessity was to be determined by normal conditions. The jury made that determination under proper instructions. As the court said in *United States v.* 25.406 *Acres of Land,* 172 F. (2d) 990, 995 (C.A. 4, 1949) certiorari denied 337 U.S. 931 (1949)

> "In cases of this sort, we must never forget that the common sense of the twelve men on the jury is a surer guaranty of justice than any attempt that might be made to give logical application to antiquated rules of evidence. If an honest and intelligent jury is given all the facts and is correctly instructed as to the law, it will come pretty near

> deciding a case correctly. Artificial rules of evidence which excluded from the consideration of the jurors matters which men consider in their everyday affairs hinder rather than help them at arriving at a just result.''

The ultimate complete development of the Columbia Basin and the need for highway 11 A as a connecting link from southwest Washington and Yakima, through the Columbia Basin into Spokane and Northwest and Central Eastern Washington, was a reality in 1943. This was a matter which the twelve on the jury, under the statement made by the court of appeals, fourth circuit in the above 172 F. (2d) 990 case, were warranted in considering as fact in their everyday affairs. The trial court was clearly in error in rejecting appellant's exhibits 5, 6, 11 and 11 A.

IV

The Only Motion Made By Appellee Was For Judgment Notwithstanding The Verdict And To Set The Verdict Aside

Appellee states in a footnote (Br. 7 and 8) that the court has not passed on the alternative motion for new trial. Counsel loses sight of the fact that the court accepted the government's oral amendment to the motion (R. 618). An ''Order Setting Aside Verdict and Directing Entry of Judgment'' was prepared and presented by the attorney for appellee. That order recites (R. 47)

> "* * * and the petitioner, United States of America, having at the time of argument, amended its motion to move for judgment notwithstanding the verdict and to set aside the verdict * * * that no good purpose could be served by granting a new trial in this proceeding * * *".

The court has passed upon the only motion before him, the amended motion. The order is a complete one. We deem counsel's question in footnote 5 answered by the amendment to the motion and the order.

CONCLUSION

In closing we here observe that if state highway 11 A had not been taken and closed, the state would have had that highway for improvement of an alternate direct route connecting Yakima and southwest Washington with the Columbia Basin, Spokane and Eastern Washington. The highway taken not only could have carried its own traffic, but it could have been utilized as a connection into the Columbia Basin area and to relieve the conjestion on the other highways, all of which is now precluded the state by reason of the taking in this case. If the government's theory is correct, the state will perpetually at its own expense be required to divert all traffic around the entire project area through Pasco or Ellensburg, and build other highways into the Columbia Basin area without any compensation from the government for the taking of the alternate highway 11 A. The state would doubtless have construct-

ed an alternate route prior to trial if it had been determined where the United States would have permitted that route (Exhibit 10). An alternate for 11 A into the Columbia Basin and across the state must now be constructed over the only route available, Route No. 3, Exhibit N. 3. The only alternative will be for the state, at great additional burden and expense, to rebuild and realign existing highways or build other highways as best it can to partially alleviate conditions caused by the taking of alternate route highway 11 A.

We respectfully urge that the theory of the trial court and of counsel for appellee in this case results in the enrichment of the United States at the expense of the state of Washington, in violation of the Fifth Amendment to the Constitution. The judgment of the trial court should be reversed with direction to reinstate the verdict.

Respectfully Submitted,

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